SUPREME COURT, U.S.
FILED
MAR 5 1993
OFFICE OF THE CLERK

No. 92-1333

In The

Supreme Court of the United States

October Term, 1992

LARRY J. HALL, d/b/a
721 ASSOCIATES and d/b/a
ASSOCIATED MARKETING,

Petitioner,

vs.

STATE OF MINNESOTA, by its
Attorney General, HUBERT H. HUMPHREY III,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Minnesota

RESPONDENT'S BRIEF IN OPPOSITION

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

JAMES P. JACOBSON
Special Assistant
Attorney General

PAUL R. KEMPAINEN
Assistant Attorney General
Counsel of Record

1400 NCL Tower
445 Minnesota Street
St. Paul, Minnesota 55101-2131
(612) 296-7575

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21 pp

QUESTION PRESENTED

I. Whether the Minnesota Supreme Court properly determined under *Central Hudson Gas & Electric Corp. v. Public Service Commission* that the Minnesota Automatic Dialing-Announcing Device statute, which protects residential privacy by requiring the listener's consent to play unsolicited recorded telephone messages, is a reasonable restriction on commercial advertising directed to citizens in their homes.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS TO DENY THE PETITION 4

I. THE MINNESOTA SUPREME COURT PROPERLY DETERMINED THAT THE MINNESOTA ADAD STATUTE IS A REASONABLE RESTRICTION ON COMMERCIAL SPEECH UNDER THE COURT'S TEST IN *CENTRAL HUDSON GAS & ELECTRIC CORP. V. PUBLIC SERVICE COMMISSION* 4

II. THERE IS NO CONFLICT BETWEEN THE MINNESOTA SUPREME COURT'S DECISION AND ANY DECISION OF ANY FEDERAL COURT OR STATE COURT OF LAST RESORT 8

III. PETITIONER'S HARDSHIP CLAIM PROVIDES NO BASIS FOR THIS COURT TO GRANT REVIEW 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

FEDERAL DECISIONS:

Board of Trustees v. Fox, 492 U.S. 469 (1989).....4, 5

Breard v. City of Alexandria, 341 U.S. 622 (1951)..... 8

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980).....3, 4, 5, 9

Cornelius v. NAACP Legal Defense Fund and Educ. Fund, Inc., 473 U.S. 788 (1985) 6

FCC v. Pacifica Found., 438 U.S. 726 (1978)..... 6

Frisby v. Schultz, 487 U.S. 474 (1988) 6

Kovacs v. Cooper, 336 U.S. 77 (1949) 10

Lamont v. Postmaster General, 381 U.S. 301 (1965) 8

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 8

Moser v. FCC, No. 92-1408-AS,___F. Supp.___, 1992 WL 435842 (D. Or. Dec. 22, 1992)..... 9

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 5

Troyer v. Town of Babylon, 483 F. Supp. 1135 (E.D.N.Y.), aff'd, 628 F.2d 1346 (2d Cir.), aff'd mem., 449 U.S. 988 (1980) 8

MINNESOTA DECISIONS:

State v. Casino Marketing Group, Inc., 491 N.W.2d 882 (Minn. 1992) 1, 5, 6, 7, 8

TABLE OF AUTHORITIES – Continued

Page

DECISIONS FROM OTHER JURISDICTIONS:

Moser v. Frohnmayer, No. S39367,___P.2d___, 1993 WL 44178 (Or. Feb. 19, 1993) 9

MINNESOTA STATUTES:

Minn. Stat. §§ 325E.26-.31 (1992) 1, 2

Minn. Stat. § 325E.27 (1992) 3

Minn. Stat. § 325E.29 (1992) 3

OTHER AUTHORITIES:

Supreme Court Rule 10 4

Supreme Court Rule 10.1(b) 9

Supreme Court Rule 15.1 3

No. 92-1333

In The

Supreme Court of the United States

October Term, 1992

LARRY J. HALL, d/b/a
721 ASSOCIATES and d/b/a
ASSOCIATED MARKETING,

Petitioner,

vs.

STATE OF MINNESOTA, by its
Attorney General, HUBERT H. HUMPHREY III,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Minnesota

RESPONDENT'S BRIEF IN OPPOSITION

Respondent State of Minnesota respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Minnesota Supreme Court upholding the constitutionality of the Minnesota Automatic Dialing-Announcing Device ("ADAD") statute, Minn. Stat. §§ 325E.26-.31 (1992). *State v. Casino Marketing Group, Inc.*, 491 N.W.2d 882 (Minn. 1992). (Petitioner's Appendix A-1.)

STATEMENT OF THE CASE

In July 1990, the Minnesota Attorney General's Office received a complaint from Abbott Northwestern Hospital in Minneapolis regarding hundreds of recorded telemarketing solicitations delivered to hospital phones. The recorded calls contained promotions for a credit card and a Las Vegas vacation. Hospital officials were powerless to stop the calls since there was no live operator on the line. (Affidavit of John LeBlanc, Respondent's Appendix A-1.)[1]

Upon investigating the source of these calls, the Attorney General's Office discovered that the calls originated from the Petitioner's home in St. Paul. The calls were delivered to phones in the hospital and thousands of Twin Cities homes by automatic dialing-announcing devices ("ADADs") located in Petitioner's home.

Thereafter, Respondent filed suit against Petitioner in Ramsey County District Court for violating the Minnesota Automatic Dialing-Announcing Device statute, Minn. Stat. §§ 325E.26-.31 (1992). This statute, enacted in 1987, restricts the use of automatic dialing-announcing devices for delivering commercial telephone solicitations.

---

[1] There is a factual dispute in the record regarding the number of calls placed to hospital phones. Because this case was appealed after entry of a temporary injunction, there have been no factual findings on this issue. The affidavit of the hospital official in this case states that repeated efforts to stop the calls were unsuccessful, and that the calls continued for ten days. (Affidavit of John LeBlanc, Respondent's Appendix A-1.) Petitioner states in his petition and attached affidavit that the calls to the hospital took place on just one day. (Petition for Writ of Certiorari to the Supreme Court of Minnesota (hereinafter "Petition") at 8 n.4.)

Before a recorded solicitation may be played, a live operator must identify the company placing the call, explain the purpose of the call and the type of goods or services the message is promoting, and state that the caller is attempting to make a sale. Minn. Stat. § 325E.29 (1992). The operator must then obtain the caller's consent before playing the recorded message. Minn. Stat. § 325E.27 (1992). These requirements do not apply if the caller and recipient have a prior business relationship. *Id.*

The district court granted Respondent's request for a temporary injunction to prohibit Petitioner from continuing to violate the ADAD statute, and the Minnesota Court of Appeals and Minnesota Supreme Court upheld the injunction. The supreme court held that the ADAD statute is a valid restriction on commercial speech under this Court's test in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

In seeking review by this Court, Petitioner relies on numerous materials in his "Statement of Facts" that are outside the record of this case and not properly before this Court. For example, Petitioner includes in his appendix an affidavit and a portion of a transcript from a proceeding in federal court in Oregon. (Petitioner's Appendix A-83, A-108.) There is no relevance to these materials and no proper basis for citing such materials and including them in Petitioner's appendix. Nor are the newspaper articles cited in Petitioner's brief and attached to Petitioner's appendix part of the factual record in this case. (Petitioner's Appendix A-115, A-120.) Accordingly, Respondent objects, under Supreme Court Rule 15.1, to the inclusion of these materials in the factual record.

REASONS TO DENY THE PETITION

Petitioner's request for review should be denied because he has failed to show that there are "special and important reasons" for this Court to grant discretionary review pursuant to Supreme Court Rule 10. First, the Minnesota Supreme Court properly applied this Court's test for commercial speech and correctly found that the Minnesota ADAD statute imposes reasonable restrictions on the use of ADADs for delivering commercial advertisements into the home.

Second, there is no conflict between the Minnesota Supreme Court's decision and any decision of any federal appellate court or state court of last resort. Indeed, this Court should allow a body of case law to be developed in the federal courts and other state courts regarding the constitutionality of ADAD laws before considering this issue.

I. THE MINNESOTA SUPREME COURT PROPERLY DETERMINED THAT THE MINNESOTA ADAD STATUTE IS A REASONABLE RESTRICTION ON COMMERCIAL SPEECH UNDER THE COURT'S TEST IN *CENTRAL HUDSON GAS & ELECTRIC CORP. V. PUBLIC SERVICE COMMISSION*.

Petitioner's recorded telemarketing solicitations constitute "commercial speech," which is subject to lesser protection than noncommercial speech. In *Board of Trustees v. Fox*, 492 U.S. 469 (1989), this Court explained that " 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position

in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' " 492 U.S. at 477 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

The standard for the regulation of commercial speech was established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Applying the *Central Hudson* test, the Minnesota Supreme Court correctly determined that 1) the state's interest in protecting residential privacy is "substantial"; 2) the ADAD statute directly advances the state's interest in protecting residential privacy; and 3) the statute is "not more extensive than necessary" to serve the state's interests. *State v. Casino Marketing Group, Inc.*, 491 N.W.2d 882, 892 (Minn. 1992). (Petitioner's Appendix A-23.)[2]

In recognizing the state's strong interest in protecting residential privacy, the Minnesota Supreme Court properly noted that the home is not a "public forum" and that citizens enjoy a heightened degree of protection within their homes. 491 N.W.2d at 889. (Petitioner's Appendix A-16.) Indeed, this Court, in upholding a ban on residential picketing, emphasized the citizen's right to avoid unwelcome intrusions into the home:

---

[2] Respondent alleges in this case that Petitioner's recorded solicitations for the credit cards and Las Vegas vacations were deceptive and misleading. This issue has not yet been litigated in the state courts. Indeed, the Minnesota Supreme Court remanded the case "with the expectation that the finder of fact will determine whether the prerecorded messages in question are accurate and nondeceptive or whether they are false and misleading." 491 N.W.2d at 892. (Petitioner's Appendix A-23.)

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear . . . , the home is different. . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.

Frisby v. Schultz, 487 U.S. 474, 484-85 (1988) (citations omitted). *See also FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (upholding ban on "offensive" radio broadcasts and noting that the "individual's right to be left alone plainly outweighs the First Amendment rights of an intruder"). In sum, a home is a "nonpublic" forum, and greater restrictions may be placed on access to citizens within their homes than are permissible in a public forum. *See Cornelius v. NAACP Legal Defense Fund and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

The Minnesota Legislature, in adopting the ADAD law, took reasonable steps to protect residential privacy from a growing barrage of unsolicited recorded messages for "credit cards," "vacations" and so-called "prizes" and "awards." As the Minnesota Supreme Court observed, ADADs allow telemarketers hawking their products to "reach an astonishing number of households selected at random." 491 N.W.2d at 889. (Petitioner's Appendix A-16.) The court added that "[u]nlike the unsolicited bulk mail advertisement found in the mail collected at the resident's leisure, the ring of the telephone mandates prompt response . . . . " 491 N.W.2d at 888. (Petitioner's Appendix A-15.) And "[u]nlike the radio or the television, . . . the telephone summons the subscriber, depriving him or her of the ability to select the expression to

which he or she will expose herself or himself." 491 N.W.2d at 888-89. (Petitioner's Appendix A-15-16.) For these reasons, the ADAD statute is a reasonable legislative effort to protect the privacy of citizens in their homes by curtailing the flow of recorded telephone solicitations.

In challenging the ADAD statute, Petitioner contends that there is no basis "to conclude that ADAD calls made with pre-recorded messages without a live operator are more intrusive than live operator calls." (Petition at 29.) This argument overlooks the fact that it is impossible for a citizen to register his or her desire not to continue to receive recorded solicitations if there is no live operator on the call. The absence of a live operator, in fact, made it impossible for officials at Abbott Northwestern Hospital to shut off the flow of recorded solicitations to hospital phones. (Affidavit of John LeBlanc, Respondent's Appendix A-1.) Further, it is well within the legislature's discretion to determine that recorded solicitations are inherently more intrusive than live solicitations and therefore to impose reasonable restrictions on the use of ADADs for commercial purposes.

In any event, the fact that the legislature chose to place certain restrictions on recorded solicitations, while continuing to allow live solicitations, provides no constitutional basis for challenging the ADAD statute's restrictions on recorded calls. Indeed, the Minnesota Supreme Court properly disposed of Petitioner's contention, explaining that "[a] regulation of commercial speech does not fail to directly advance the state's substantial interest merely because it does not eradicate all the evils that

offend that interest." 491 N.W.2d at 890 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510-12 (1981)). (Petitioner's Appendix A-19.)

Finally, the cases on which Petitioner relies are inapplicable because they involved restrictions on fully protected constitutional speech, rather than commercial speech. For example, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), involved a content-based restriction on mailings that contained "communist political propaganda." And *Troyer v. Town of Babylon*, 483 F. Supp. 1135 (E.D.N.Y.), *aff'd*, 628 F.2d 1346 (2d Cir.), *aff'd mem.*, 449 U.S. 988 (1980), involved door-to-door solicitations by members of a religious group.[3] These cases involving fully protected political and religious speech have no relevance to the present case, which involves restrictions on purely commercial advertising messages delivered to citizens in their homes.

II. THERE IS NO CONFLICT BETWEEN THE MINNESOTA SUPREME COURT'S DECISION AND ANY DECISION OF ANY FEDERAL COURT OR STATE COURT OF LAST RESORT.

As Petitioner correctly points out, the United States Congress and the majority of states have passed laws imposing restrictions on the use of ADADs for delivering commercial messages. At this time, however, there is no

---

[3] Significantly, in the one door-to-door canvassing case decided by this Court involving *commercial* speech, the Court upheld a conviction under a city ordinance that banned door-to-door solicitations. *Breard v. City of Alexandria*, 341 U.S. 622 (1951).

conflict between the Minnesota Supreme Court and any other state court of last resort or any federal appellate court regarding the constitutionality of ADAD laws under the First Amendment. Sup. Ct. R. 10.1(b).[4]

Indeed, the case pending in federal district court in Oregon concerning the federal ADAD law will provide the first opportunity for a federal court to address similar constitutional issues. *Moser v. FCC*, No. 92-1408-AS,___F. Supp.___, 1992 WL 435842 (D. Or. Dec. 22, 1992) (granting preliminary injunction to enjoin enforcement of the federal ADAD law). That case, however, is still in its preliminary stages. Before ruling on the constitutionality of ADAD laws, this Court should allow the issues in *Moser* and other cases to percolate through the federal court system.

III. PETITIONER'S HARDSHIP CLAIM PROVIDES NO BASIS FOR THIS COURT TO GRANT REVIEW.

In seeking review by this Court, Petitioner contends that the ADAD statute imposes economic hardship by shutting down his telemarketing operation. However, the

---

[4] Although the Oregon Supreme Court struck down the Oregon ADAD law on February 19, 1993, its decision was based solely on the Oregon Constitution and did not involve a First Amendment analysis under *Central Hudson*. *Moser v. Frohnmayer*, No. S39367,___P.2d___, 1993 WL 44178 (Or. Feb. 19, 1993). Because that case was decided under Oregon constitutional law, it does not create a conflict with the Minnesota Supreme Court's decision, which was based on federal constitutional law.

ADAD statute does not bar all commercial telemarketing in Minnesota, and leaves open alternative marketing channels for Petitioner to employ. Petitioner, for example, remains free to contact consumers by telephone with a live operator, and then to play recorded messages to consumers who grant their consent. In sum, the ADAD statute, which imposes reasonable time, place and manner restrictions on telephone advertising to consumers in their homes, leaves open alternative telemarketing channels for Petitioner to employ in advertising credit cards, travel promotions and other commercial products.

Further, Petitioner cites no authority for his contention that the alleged hardship he suffers prevents the state from protecting residential privacy by restricting the use of ADADs. Of course, if claims of "hardship" did provide grounds for challenging otherwise valid public protection laws, then any person who chose to engage in an illegal occupation could assert a hardship claim to prevent enforcement of such laws. Moreover, the restriction on ADADs for commercial marketing is akin to the ordinance banning sound trucks that this Court upheld in *Kovacs v. Cooper*, 336 U.S. 77 (1949). If a city can completely ban the use of sound trucks for delivering messages to citizens, then surely the state can place restrictions on the use of ADADs for advertising products to citizens in their homes.

Finally, Petitioner's hardship claim is undermined by the fact that he started his ADAD business in Minnesota *after* the ADAD statute went into effect in 1987. Because Petitioner chose to set up his telemarketing operation in a

state that already restricted the use of ADADs, any hardship Petitioner suffered was self-inflicted.[5]

For all these reasons, Petitioner's hardship claim provides no constitutional basis for this Court to grant Petitioner's request for review.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition be denied.

Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

JAMES P. JACOBSON
Special Assistant
Attorney General

PAUL R. KEMPAINEN
Assistant Attorney General
Counsel of Record

1400 NCL Tower
445 Minnesota Street
St. Paul, Minnesota 55101-2131
(612) 296-7575

Attorneys for Respondent

[5] Petitioner stated in his brief to the Minnesota Supreme Court that he had been operating ADADs for "two years." (Appellant's Brief at 7.) The ADAD statute, however, went into effect in 1987, before Petitioner commenced his ADAD telemarketing operation in Minnesota.

APPENDIX

STATE OF MINNESOTA

COUNTY OF RAMSEY

State of Minnesota, by its Attorney General, Hubert M. Humphrey, III,

Plaintiff,

vs.

Casino Marketing Group, Inc., and Larry J. Hall a/k/a Bud Hall, d/b/a 721 Associates, and d/b/a Associated Marketing,

Defendants.

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Case Type: _____

Court File No. _____

AFFIDAVIT OF JOHN W. LeBLANC

I, John W. LeBlanc, being fully sworn upon oath, deposes and says:

1. I am one of the Telecommunications Manager for Abbott Northwestern Hospital, Inc., located at 800 East 28th Street, Minneapolis, MN 55407. I have been the Telecommunications Manager for Abbott Northwestern Hospital for approximately one year. As Telecommunications Manager, I am partially responsible for the operation of the telecommunications system at Abbott Northwestern Hospital.

2. Abbott Northwestern Hospital controls the entire 863 prefix in area code 612, and all calls to an 863 telephone number in this area code are received at the hospital.

3. In my capacity as the Telecommunications Manager, I have learned that patients and employees of the

hospital have been receiving prerecorded telephone calls at the hospital through an automatic dialing device operated by Casino Marketing Group, Inc., of Las Vegas, Nevada. These calls are not preceded by a live operator. Recipients of the calls are instructed to contact 1-800-765-3300 to receive a "prize" of a Las Vegas vacation. It is my understanding that these prerecorded messages have been coming into the hospital since approximately July 1, 1990. These calls have disturbed the patients at our hospital and have inconvenienced our employees.

4. On July 9, 1990, I telephoned the toll-free number of 1-800-765-3300. The purpose of my call was to inform the manager that his company's automatic dialing devices were disrupting patients and interfering with hospital business and to request that the calls cease. I asked to speak with the manager. I was told that the manager was unavailable but that my call would be returned. I did not receive a call back from anyone at Casino Marketing Group, Inc.

5. On July 9, 1990, I received a call from Diane Beach, Director of Volunteer Services at Abbott Northwestern Hospital. Ms. Beach contacted me to complain about a call she received, at a hospital telephone, from Casino Marketing Group, Inc. Ms. Beach stated that she telephoned the toll-free number of 1-800-765-3300 during the week of July 1. During this call, she informed the Casino Marketing Group, Inc., employee they were telephoning a hospital and that the calls were disrupting hospital patients and interfering with hospital business. Ms. Beach asked that the calls be stopped.

6. In my capacity as Telecommunications Manager, I learned from Mary Small, the hospital's Director of Communications/Public Relations, that on or about July 9th, she too had attempted to halt calls into Abbott Northwestern Hospital from Casino Marketing Group, Inc. Ms. Small had telephoned the company at (702) 253-3300, the directory listing for Casino Marketing Group, Inc. Ms. Small informed an employee of Casino Marketing Group, Inc., that calls to Abbott Northwestern Hospital were in violation of Minnesota law and asked that the calls cease. She informed the Casino Marketing Group that approximately 800 patient phones have been disturbed by their employees. The employee thanked her for her information. Apparently no action to halt the calls was taken.

7. Despite these efforts to halt the calls, calls have continued to come into the Abbott Northwestern telephone system from Casino Marketing Group, Inc. Calls have been received every day through July 10, 1990.

8. I am also aware that several individuals at the hospital received a similar prerecorded message offering a "gold card" credit card. Interested recipients were instructed to telephone a local telephone number for more details. This number is answered by an answering machine, asking for the caller's name and phone number. My message on this answering machine requesting that these calls stop was never returned.

9. I am quite concerned about this practice because it is disruptive to patients. Calls have been made by Casino Marketing Group, Inc., to patients in the Intensive Care Unit and coronary care units. These patients are

gravely ill, and disruptive, offensive or annoying calls could endanger their well-being.

Dated: September 24, 1990.

/s/ John LeBlanc
JOHN LeBLANC

Subscribed and sworn to
before me this 24th day
of September, 1990.

/s/ Roberta L. Dalos
NOTARY PUBLIC

[SEAL] ROBERTA L. DALOS
NOTARY PUBLIC - MINNESOTA
ANOKA COUNTY
My Commission Expires Sept. 3, 1991